

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by  
David Beaulieu, Commissioner,  
Department of Human Rights,

Complainant,

v.

Lloyd A. Wallin, D.D.S.,

Respondent.

**ORDER ON MOTION FOR  
RECONSIDERATION**

The above-entitled matter is before the undersigned Administrative Law Judge on Respondent's motion for reconsideration. Respondent filed this motion on May 28, 1996. Complainant filed a response memorandum on June 11, 1996. The record closed on June 11, 1996.

Andrea Mitau Kircher, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN, 55101, represented the Complainant.

Scott R. Suter, Esq., 301 Degree of Honor Building, 325 Cedar Street, St. Paul, Minnesota, 55101, represented the Respondent.

Based upon the Memoranda filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

That Respondent's motion for reconsideration is DENIED.

Dated this \_\_\_\_ day of July, 1996

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GEORGE A. BECK  
Administrative Law Judge

**MEMORANDUM**

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on November 28, 1995, at the Office of Administrative Hearings in Minneapolis, Minnesota. The issue at the hearing was whether Respondent's defamation action against the Charging Party constituted reprisal discrimination in violation of Minn. Stat. § 363.03, subd. 7. Andrea Mitau Kircher, Assistant Attorney General, appeared on behalf of the Complainant. Lloyd Wallin, the Respondent, appeared on his own behalf without benefit of counsel. The hearing lasted six days and ended on December 15, 1995.

On January 11, 1996, Judge Lunde notified both parties that, as a result of illness, he had been placed on disability retirement effective January 9, 1996. Judge Lunde further notified the parties that it would be necessary for another Administrative Law Judge to prepare the Findings of Fact, Conclusions of Law, and Order in this case. Judge Lunde requested that the parties contact Administrative Law Judge George Beck if they had objections. On January 19 and January 22, 1996, the parties responded to Judge Lunde's letter. Neither party objected to the case being reassigned to another Administrative Law Judge. On January 29, 1996, Administrative Law Judge George Beck notified both parties that he had been assigned to this matter. On March 6, 1996, the record closed upon final receipt of the parties post-hearing memoranda. On March 22, 1996, Judge Beck issued the Findings of Fact, Conclusions of Law, and Order.

Respondent has brought a motion for reconsideration pursuant to Minn. Rules, pt. 1400.8300. Minn. Rules, pt. 1400.8300, provides that a judge shall grant a motion for reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and if one of several factors have occurred including: irregularities in the proceeding whereby the moving party was deprived of a fair hearing; excusable neglect; or the decision is not justified by the evidence or is contrary to law.

First, Respondent maintains that he is entitled to a rehearing due to the irregular procedure of reassigning this matter from Judge Lunde to Judge Beck. Respondent argues that because Judge Beck only reviewed the written record and was not present during any of the testimony, this matter should be reassigned and reheard. Respondent asserts that it is a matter of substantial justice that the judge who prepares the order be the one who had the opportunity to observe the witnesses and to assess their credibility. Therefore, Respondent requests that Judge Beck disqualify himself and order this matter reheard.

The Findings of Fact, Conclusions of Law, and Order for Judgment in this matter was prepared by Judge Beck upon the record made before Judge Lunde. The record included the typed transcript of the hearing (over 1,000 pages ), the exhibits, and the parties' memoranda. As explained in the introductory paragraph of the decision, the order was reviewed and approved by Judge Lunde prior to issuance. Judge Lunde also signed the order. Neither party objected to the reassignment of this matter to Judge Beck. Respondent has failed to demonstrate how the preparation of the order by Judge Beck deprived him of a fair hearing, especially given that Judge Lunde approved and signed the order. Therefore, Respondent's motion for reconsideration and rehearing based on the reassignment of this matter from Judge Lunde to Judge Beck is denied.

Respondent also argues that the findings of fact, conclusions of law, and order for judgment are not justified by the evidence and are contrary to law. Respondent insists that the findings of fact contain a great deal of irrelevant information which, according to Respondent, reveals that the ALJ did not fully appreciate the issue at hand. (R. brief p. 5). In particular Respondent claims that Findings of Fact Nos. 3-11, 21, 25, 29, 31, 35, 50 are all irrelevant to the issue of whether Respondent's defamation action constituted illegal retaliation. Respondent also maintains that "forcing [Dr. Wallin] to rebut the voluminous irrelevant evidence substantially diminished his ability to focus on the issues." (R. Brief p. 5). Therefore, according to Respondent, because the judge admitted and relied on irrelevant evidence a new hearing is warranted.

Contrary to Respondent characterization, Dr. Wallin was not forced to address voluminous irrelevant evidence at the hearing. Rather, the majority of the findings which Respondent labels as "irrelevant" were made in response to evidence and arguments presented by Dr. Wallin. For example, the judge notes that Dr. Wallin insisted throughout the hearing that the Department of Human Rights failed to interview witnesses he had suggested and failed to consider evidence he thought was important during its probable cause investigation. Based on this perceived failure to investigate, Dr. Wallin argued that the Department's probable cause finding was without merit. During the hearing, Dr. Wallin called several witnesses including his dental consultant Lauren Wood. Dr. Wallin believed Ms. Wood's testimony to be highly relevant. Finding of fact No. 4 addresses Ms. Wood's role in this matter. Given Dr. Wallin's *pro se* status, the judge made a deliberate effort to address all of the arguments raised by Dr. Wallin in his own defense. In addition, other findings of fact listed as irrelevant by Respondent go to the issue of the charging party's good faith filing of the original sexual harassment complaints and Respondent's propensity for threatening behavior. All findings and conclusions in the judge's decision address the relevant issues and evidence presented in this case as well as other arguments raised by Dr. Wallin. Respondent's claim that irrelevant evidence was admitted and irrelevant findings were made does not rise to the level of justification for rehearing or reconsideration where the judge did not rely on irrelevant evidence in making his determination.

Respondent also maintains that a conciliation court judgment in Respondent's favor cannot be the basis for a reprisal claim under Minn. Stat. § 363.03, subd. 7. In addition, Respondent argues that it was illogical for the judge to find that Respondent's defamation claim lacked a reasonable basis and constituted intentional reprisal discrimination when Respondent prevailed on his defamation claim in conciliation court. In response to these arguments, the judge first notes that courts have found defamation claims by employers to constitute illegal reprisal under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. See, EEOC v. Virginia Carolina Veneer Corp., 495 F.Supp. 775 (W.D. VA 1980); Thomas v. Petruilis, 465 N.E.2d 1059 (Ill. App. 2 Dist. 1984). Principles developed by courts in Title VII cases are instructive and may be applied when interpreting the Minnesota Human Rights Act. Fore v. Health Dimensions, Inc., 509 N.W.2d 557, 560 (Minn. App. 1993). Beyond that, the judge believes that Respondent's claim regarding the reasonable basis for his defamation action was adequately addressed in the final decision and nothing in Respondent's current motion persuades the judge that he should have ruled differently. Therefore, Respondent's motion for reconsideration based on his successful conciliation court action is denied.

Respondent also argues that the judge misstated the law with respect to the burden of proof required to establish a claim of reprisal discrimination. Quoting from McGrath v. TCF Bank Sav., 502 N.W.2d 801, 806 (Minn. App. 1993), modified, 509 N.W.2d 365, 366 (Minn. 1993), and Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988), the judge stated in the memorandum attached to the order that:

“... it is not necessary that Complainant establish that the reprisal discrimination was the sole or even primary, reason for the adverse action. Id. Rather, Complainant may prevail if an illegitimate reason “more likely than not” motivated the adverse action. McGrath, 509 N.W.2d at 366; Anderson, 417 N.W.2d at 627.

The judge concluded that retaliation was a substantial causative factor motivating Respondent in the filing of his defamation suit against the Charging Party. (Conclusion of Law No. 13). If retaliation was a substantial causative factor, Respondent violated Minn. Stat. § 363.03, subd. 7. McGrath v. TCF Bank Sav., 509 N.W.2d 365, 366 (Minn. 1993); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 624 (Minn. 1988). The judge does not agree with Respondent that an improper legal standard of proof was adopted. Therefore, Respondent’s motion for reconsideration based on the decision being contrary to law is denied.

Respondent also maintains that a rehearing is warranted based on his “excusable neglect” in not hiring an attorney. Again, Respondent claims that being “forced” to rebut “volumes of irrelevant evidence” overwhelmed him. Respondent argues that substantial justice requires that he be granted a new hearing with representation by counsel. The judge agrees with Complainant that it was abundantly clear to Dr. Wallin that he would have done well to hire an attorney. It was Dr. Wallin’s decision to proceed without representation of counsel. If a rehearing was justified based on a pro se litigant’s “excusable neglect” in not hiring an attorney, courts would be required to rehear every case in which a pro se litigant lost. Respondent’s motion for reconsideration and rehearing based on his excusable neglect in not hiring an attorney is denied.

Finally, Respondent argues that the award of costs is grossly excessive in this case and payment of the amount ordered will impose a financial hardship on him. However, Respondent has failed to present any facts demonstrating financial hardship pursuant to Minn. Stat. § 363.071, subd. 7. Exhibit No. 34 established a substantial adjusted gross income for 1994. Absent evidence of financial hardship, the award of costs will not be reduced. Therefore, after consideration of the memoranda filed by both parties, Respondent’s motion for reconsideration and rehearing is denied.

G.A.B.